

Summary Adjudication: Italy

Summary adjudicatory mechanisms exist in Italy which are awesome in their swiftness, and drastic in their consequences. There is, however, no Italian equivalent to a motion for summary judgment employable in ordinary civil proceedings.¹ Rather, provision is made for special summary proceedings which may be utilized only for particular kinds of claims, or if particular kinds of documentary evidence exist. Of the several types of special proceedings, two primarily involve debt collections. Others involve eviction of lessees from real property and the recovery of leased personal property, as well as the protection or recovery of other possessory rights.²

The two debt-collection proceedings will be the primary focus of this brief paper; they may be denominated as summary execution and summary *ex parte* proceedings.

Summary Execution

In Italian law, certain written instruments are equated with judgments for purposes of levying execution.³ Instruments which may form the basis for levy of execution, include bills of exchange, promissory notes and various kinds of checks, as well as instruments executed before a notary public or other authorized public official calling for the payment of a sum certain.⁴

*Professor of Law, Fordham University School of Law.

¹In Italy, civil litigation encompasses commercial litigation as well. Unlike some other European states, Italy has no separate commercial courts or procedure.

²Modern summary judgment mechanisms in the United States owe their historical genesis to the English Summary Procedure on Bills of Exchange Act of 1855, a procedure which was subsequently extended to actions to recover debts generally and to evictions, and finally, in many jurisdictions, to all kinds of actions. The English Act of 1855 was influenced by Italian practice. See J. Bauman, *Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956).

³Judgments and other instruments which can be used as a basis for summary execution are collectively known as *titoli esecutivi*.

⁴*Codice di procedura civile*, art. 474 as supplemented by decrees governing bills and notes. Royal Decree of Dec. 14, 1933, art. 63; Royal Decree of Dec. 21, 1933 No. 1736, arts. 55, 86, 90, 100, 104, 106, 107.

American commercial paper and notarial acts may not be entitled to enforcement by summary execution, inasmuch as such instruments are not equated with judgments in American law. See M. CAPPELLETTI AND J. PERILLO, *CIVIL PROCEDURE IN ITALY* 390-91 (1965). Such instruments may be utilized, however, as the basis of a summary *ex parte* proceeding.

Prior to execution, the creditor must serve upon his debtor a formal notice known as a precept⁵ indicating that if payment is not received within a specified time (at least ten days must be allotted), execution proceedings will be initiated. The precept is served upon the debtor by a court officer (whose functions are more or less akin to those of a federal marshal in the United States) in the same manner as an instrument initiating a normal civil proceeding.⁶ From this point on, however, there is no resemblance to an ordinary proceeding. If the person served takes no action, at the request of the creditor, the court officer proceeds to attach such non-exempt property as may be discovered, just as he would if the precept had been based upon a judgment, and then proceeds with the liquidation of the attached property.⁷

Upon service of the precept, the alleged debtor may oppose summary execution by bringing an ordinary civil action to determine the rights of the parties.⁸ Upon commencement of such an action, the court may stay the execution,⁹ but when a stay is granted, the court normally imposes upon the alleged debtor, a requirement that a bond be posted.¹⁰ Thus, as a practical matter, since the creditor may proceed with execution or have the security of a bond, there is little incentive for a debtor to institute a proceeding for merely dilatory motives.

Summary *ex parte* Proceedings

A summary *ex parte* proceeding may be brought to recover a liquidated sum of money, a specified chattel or a specific amount of fungible goods.¹¹ Such a proceeding may be brought only if the debtor resides, is domiciled or present, or has an agent, in Italy.¹² In addition, the decree may issue only on the basis of documentary evidence.¹³ Very often the documentary evidence utilized in a summary *ex parte* proceeding is of the kind which could form the basis for summary execution. The claimant, however, may

⁵The formal requirements of a precept are summarized in M. CAPPELLETTI AND J. PERILLO, *op.cit. supra*, note 4, at 321-22.

⁶Service of process is discussed in CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 157-65.

⁷Attachment and liquidation of assets are discussed in CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 323-33.

⁸See CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 338-341.

⁹*Codice di procedura civile*, art. 624.

¹⁰See G. Gorla, *Procedimenti sommari nel diritto Anglo-Americano*, 22 RIVISTA DI DIRITTO PROCESSUALE 56 (1967).

¹¹*Codice di procedura civile* art., 633, para. 1.

¹²*Ibid.*, para. 3. This paragraph merely states that the decree may issue only if notice of the decree can be served in Italian territory. Service within Italy may be made only in the circumstances stated in the text.

¹³*Ibid.*, para. 1. On the kinds of documentary evidence which may be utilized in this proceeding, see CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 344-45.

choose to utilize summary *ex parte* procedure because the respondent is required to interpose his defenses, if any, more promptly than under the summary execution procedure.

The proceeding is commenced by an *ex parte* application to the competent court.¹⁴ The documentary evidence upon which the claimant relies must accompany the application. If the application is rejected it is without prejudice to the right to bring another such proceeding or an ordinary civil action.¹⁵ If the application is granted, it is in the form of a decree ordering¹⁶ the respondent to pay (or deliver the goods) within a specified time, usually twenty days. In addition, the decree may provide that execution may be had immediately,¹⁷ subject to restitution if the decree is subsequently set aside. Such a provision in the decree is mandatory, at the request of the claimant, if the decree is based upon an instrument which could have been used as the basis for summary execution.¹⁸

The respondent is first made aware of the proceeding when an authenticated copy of the decree is served upon him.¹⁹ Within the time allotted by the decree, the debtor may move to set the decree aside.²⁰ Once such an application has been made, the proceeding unfolds as an ordinary civil action, with the burden of proof on the claimant.²¹ Again, as with summary execution, dilatory defenses by the debtor are inhibited at least in those instances in which the decree authorizes execution to proceed immediately. Even if the decree did not so provide, the claimant may move to have execution issue upon the decree if the defenses raised in the respondent's application to set the decree aside are not supported by documentary evidence, or are likely not to be resolved except after protracted proceedings.²² In any event, the court must order immediate execution if the claimant offers to post bond.²³ Only on serious grounds may the respondent obtain a stay of execution.²⁴

¹⁴The contents of the application are governed by *Codice di procedura civile*, art. 638.

¹⁵*Ibid.*, art. 640, para. 3.

¹⁶The order is known as an *ingiunzione*, a cognate word of "injunction." There is little similarity, however, between the effect of the Italian decree and the Anglo-American injunction. In particular, failure to comply with the order is in no sense deemed to involve contempt of court.

¹⁷The claimant may be ordered to post bond if this discretionary provision is written into the decree. *Codice di procedura civile*, art. 642, para. 3.

¹⁸It does not appear that the court can order the claimant to post bond in this situation. *Ibid.*, para. 1.

¹⁹*Ibid.*, art. 643.

²⁰*Ibid.*, art. 645.

²¹G. Micheli, *L'onere della prova* 407-08 (1942).

²²*Codice di procedura civile*, art. 648, para. 1.

²³*Ibid.*, para. 2.

²⁴*Ibid.*, art. 649.

Summary *ex parte* proceedings play an enormous role in the Italian legal system. The number of summary *ex parte* decrees issued each year is about equal to the number of ordinary adversary proceedings commenced during that year.²⁵ Although no statistics are available, it is credibly estimated that over 90 per cent of the decrees are uncontested.²⁶

Proceedings to Evict a Lessee of Real Property or to Recover Leased Personal Property — Other Possessory Proceedings

Eviction proceedings (applicable to real and personal property) are governed by a number of special rules as to the form of the document initiating the proceeding, and by other procedural details which need not concern us here.²⁷ In general an eviction proceeding is commenced as is any ordinary adversary proceeding by service of process upon the lessee of real or personal property. A major difference concerns the effect of the defendant's failure to appear. While no automatic default judgments may issue in ordinary proceedings, in eviction proceedings, if the lessee fails to put in an appearance, a default judgment is forthwith entered against him.²⁸ If the eviction is based upon non-payment of rent, the lessor or his attorney must affirm in court that the rent is still unpaid.²⁹ In addition to ordering eviction of the lessee, the court may order payment of rent in a separate decree which has the enforcement characteristics of a summary *ex parte* decree.³⁰

Another major difference between an eviction proceeding and an ordinary proceeding is that if the defenses raised by the lessee are not supported by documentary evidence, the court must forthwith order summary eviction unless serious grounds exist for not ordering immediate ouster of the lessee.³¹ A summary eviction order may be conditioned on the posting of bond by the lessor. After the summary eviction takes place the lessee's defenses will be heard in an ordinary civil proceeding to determine the merits, which may result in restoration of the lessee's possession, or payment to him of damages.

²⁵"[I]n the years 1957 to 1962, respectively, summary *ex parte* decrees were rendered in 524,000, 507,000, 505,000, 496,000, 465,000 and 436,000 cases. In the same years, 532,000, 503,000, 497,000, 500,000, 458,000 and 438,000 ordinary adversary cases were commenced . . ." M. CAPPELLETTI, J. MERRYMAN AND J. PERILLO, *THE ITALIAN LEGAL SYSTEM* 123 (1967).

²⁶See B. Merlo, *Procedimento d'ingiunzione*, in 5 *Enciclopedia forense* 995, 957 (1959-60).

²⁷See generally, CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 348-50.

²⁸*Codice di procedura civile*, art. 663, para. 1. On failure to appear in ordinary proceedings, see note 37 *infra* and accompanying text.

²⁹*Codice di procedura civile*, art. 663, para. 3.

³⁰*Ibid.*, art. 664.

³¹*Ibid.*, art. 665.

Other summary possessory proceedings exist for the prompt re-acquisition of possession of real or personal property from which the possessor has been ousted, and for the protection of possession when an ouster is threatened.³² Essentially such proceedings are in the nature of proceedings for provisional remedies. In two respects, however, summary possessory proceedings differ from provisional-remedy proceedings. The applicant need not allege or show a *prima facie* right to possession. He need only show that *de facto* possession has been disturbed or is threatened. The thrust of the proceeding is to inhibit self-help in the recovery of possession. Second, the order of the court will stand as a final judgment if no proceeding is commenced to determine *de-jure* rights to possession within allotted time limits.

Other Summary Mechanisms

Throughout the Code of Civil Procedure a variety of mechanisms exist for speeding relief to a plaintiff. Provision is made for a wide variety of provisional remedies: for example, sequestration, restraining orders and temporary support orders.³³ In addition, although a judgment is not ordinarily subject to execution until it has been confirmed or reformed on appeal,³⁴ the court of first instance may order immediate execution of a judgment based on highly probative documentary evidence, or if delay in execution would endanger the rights of the judgment creditor.³⁵

In the event that liability is deemed proved, and the issue is the quantum of damages, a court of first instance may render a judgment determining liability and assessing such amount of damages as is admitted or has been proved, subject to further proceedings to determine additional damages. Ordinarily execution may be had immediately upon the provisional assessment of damages.³⁶

Observations

Summary procedure is a major institution of Italian civil procedure. Why this should be so is in part explainable by the rules governing defaults in ordinary civil procedure.³⁷ A default is not an admission of the plaintiff's

³²See generally, CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 350-52.

³³See *ibid.*, at 131-143.

³⁴Appeal (*appello*) refers to the review of questions of fact and law by an intermediate court. It is after review in such a court, or waiver of such review, that a judgment is ordinarily enforceable, although a further review (*cassazione*) of questions of law is ordinarily available. See CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 256-97.

³⁵*Codice di procedura civile*, art. 282.

³⁶*Ibid.*, para. 3. See CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 151-52.

³⁷See generally, CAPPELLETTI AND PERILLO, *op. cit. supra*, note 4, at 297-303.

allegations. Upon default, the plaintiff must make out a prima facie case in a court hearing. In addition, a default judgment may be appealed by a defaulting defendant and on appeal he may introduce testimonial and documentary evidence. Thus claims, particularly debt collection claims, which frequently are disposed of summarily in the United States by default judgments, would in Italy impose a heavy burden on the courts if ordinary proceedings were utilized. Also, the possibility of dilatory practices by debtors would be greatly enlarged, particularly in view of the lack of machinery in ordinary proceedings to eliminate dilatory pleas.³⁸ It is most difficult to conceive of the grafting of motions for summary judgment onto ordinary civil litigation, since out-of-court affidavits are almost non-existent. Although the Italian notary is an important individual in the legal system, he may administer oaths only in rare cases.

It is worthy of note that summary proceedings are totally plaintiff oriented. There is no summary mechanism by which a defendant may unburden himself of an action. Moreover, the orientation of summary proceedings is toward particular classes of plaintiffs—creditors and lessors as against debtors and lessees. In view of the recent decision of the United States Supreme Court³⁹ outlawing summary garnishment before trial on the ground, *inter alia*, that it is discriminatory as against the poor, one can but conjecture whether summary proceedings in Italy can withstand attack against the even more definite provisions of the Italian Constitution prohibiting discrimination on economic grounds.⁴⁰ It was on such grounds that the Italian Constitutional Court struck down the necessity of posting security for costs and the requirement that the taxpayer pay his assessed tax prior to contesting an assessment.⁴¹

³⁸Despite the absence of a jury system, ordinary civil proceedings are of protracted duration. A brief statistical analysis appears in M. CAPPELLETTI, J. MERRYMAN AND J. PERILLO, *op. cit. supra*, note 25, at 125–26. A large proportion of cases are appealed. *See id.* at 148.

³⁹*Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969); *see also* *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 382, 303 N.Y.S.2d 382 (1969) (broad warrant of attorney authorizing confession of judgment violates due process).

⁴⁰Italian Constitution, arts. 3, 24.

⁴¹These cases are discussed in CAPPELLETTI, MERRYMAN AND PERILLO, *op. cit. supra*, note 25, at 59, 118–119.